SUPREME COURT, U. S.

FILED

FEB 10 1975

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

- - -

No. 74-998

- - -

HARRY EDMOND FOWLER, JR.,
COUNTRY REALTY COMPANY,
MARILYN HOLLINGSWORTH,
SCENIC SITES, INCORPORATED,
and GEORGE RAYMOND SMITH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

- - -

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

Donald C. Walker
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Attorneys for petitioners.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

- - -

No. _____

- - -

HARRY EDMOND FOWLER, JR.,
COUNTRY REALTY COMPANY,
MARILYN HOLLINGSWORTH,
SCENIC SITES, INCORPORATED,
and GEORGE RAYMOND SMITH,

Petitioners,

v.

STATE OF OREGON,

Respondent.

- - -

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

- - -

Petitioners pray that a writ of certiorari issue to review the opinion of the Court of Appeals of Oregon rendered August 26, 1974 and the order of the Supreme Court of Oregon of November 13, 1974 denying the petition of petitioners for review of said Court of Appeals opinion.

OPINION BELOW

The opinion of the Court of Appeals of Oregon was rendered on August 26, 1974 and appears in 99 Advance Sheets of Oregon, page 1293, and is cited as 525 P.2d 1061 (App A, Infra, pp 1-7). The order denying petition for review was rendered without opinion on November 13, 1974. (App B, infra, p 8)

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1257[3]. The opinion of the Court of Appeals of Oregon was rendered on August 26, 1974 and petition for review was filed by petitioners on September 23, 1974 (App C, infra, p 9), and the Court of Appeals denied a rehearing on October 2, 1974 and the Supreme Court of Oregon denied the petition for review on November 13, 1974.

QUESTIONS PRESENTED

1. Were petitioners placed twice in jeopardy in violation of the Fifth Amendment to the U.S. constitution, made applicable to the States by the Fourteenth Amendment to the U.S. constitution?

2. Did the Oregon courts fail to apply the "manifest necessity" requirement when they refused to apply the constitutional prohibition against placing a defendant twice in jeopardy under said Fifth Amendment?

3. Did the discharge of the jury on the first indictment by the court without the presence or consent of the petitioners constitute a violation of the Fifth and Fourteenth Amendments to the U.S. constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth and Fourteenth Amendments to the U.S. constitution.

See pp 7 - 9, infra for pertinent portions.

FORMER OPINION INVOLVED

State of Oregon,

Plaintiff-Respondent,

v.

Harry Edmond Fowler, Jr., et al,

Defendants-Appellants.

See 99 Advance Sheets of Oregon, August 26, 1974, page 1293;

525 Pac. Rep. 2d 1061.

STATEMENT OF THE CASE

On May 17, 1973, Multnomah County, Oregon Grand Jury returned a secret indictment against petitioners charging violation of Oregon Subdivision Control Law, Oregon Revised Statutes 92.230, on a felony

charge that they offered sub-divided lands for sale without having complied with the cited statute. (App D, infra, pp 10-14) Trial was set for August 30, 1973 and on that date petitioners appeared for trial and a jury was impanelled and sworn and opening statements were made by counsel for the prosecution and by counsel for petitioners. A witness was produced by the prosecution and was duly sworn as such and testified. Upon the witness being asked by the prosecution whether he knew the petitioners, their counsel objected on the ground, among others, that the indictment failed to state sufficient facts to constitute a crime. (Tr 29) The trial court sustained the objection and held that the indictment was insufficient and thereafter discharged the jury in the absence of petitioners and their counsel. (App E, infra, p 15) (App F, infra, pp 16-17)

Thereafter, on September 18, 1973, the Grand Jury of Multnomah County, Oregon again

indicted petitioners on the same alleged causes and for violation of the same statute. (App G, infra, pp 18-19)

Petitioners entered pleas of double jeopardy or former acquittal (App H, infra, p 20), and the prosecution demurred to these pleas and the court sustained the demurrer. (App I, infra, p 21) Trial was had on the second indictment and petitioners were convicted thereon on November 28, 1973. (App J, infra, pp 22-23) Petitioners were sentenced on December 21, 1973 (App K, infra, pp 24-29) and duly appealed on February 15, 1974 (App L, infra, pp 30-31). Amongst the assignments of error on appeal (App M, infra, pp 32-33) was that of double jeopardy, as to which the Court of Appeals said: (App A, infra, p 7):

> "Other assignments of error deal with claims of technical errors which in no way affect the substantive or procedural rights of the parties. We see no public advantage in discussing these remaining assignments."

REASONS FOR GRANTING THE WRIT

The Fifth Amendment to the United States constitution states:

> " * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *"

Amendment XIV of the U.S. constitution states:

> " * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

In Illinois v. Somerville, 410 U.S. 458, 461, 462, the court adopted the "manifest necessity" rule (page 458). It also quotes with approval Justice Story in U.S. v. Perez, 9 Wheat 579 (1824) when, as quoted on page 461, he says:

> " * * * whenever * * * there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated * * * To be sure, the power ought to be used with the greatest caution, under urgent circumstances, * * *"

On page 462 the court says:

> "In reviewing the propriety of the trial judge's exercise of his discretion, this Court, following the counsel of Mr. Justice Story, has scrutinized the action to determine whether, in the context of that particular trial, the declaration of a mistrial was dictated by "manifest necessity" or the "ends of public justice."

The attitude of all of the courts of Oregon that treated the important issue of double jeopardy guaranteed by the Federal constitution was cavalier and is typified by the Court of Appeals in its opinion (App A at p. 7) when it said:

> "other assignments of error (including double jeopardy) deal with claims of technical errors which in no way affect the substantive or procedural rights of the parties. We see no public advantage in discussing these remaining assignments."

The four justices who dissented from the majority in the Illinois v. Somerville case were evidently concerned that as a result of the majority opinion the double jdopardy guarantee would be abandoned by State courts, and this may have happened in the instant case.

The writ should be granted because the Oregon courts have acted on this constitutional issue in derogation of the Illinois v. Somerville majority and minority opinions and in derogation of the Fifth Amendment itself.

Also, the facts in this case are squarely within the ANNOTATION in 150 ALR 764 and cases therein cited that show that double jeopardy attaches upon impanelling of the jury and swearing of a witness and the discharge of the jury in the absence of the defendant, effecting an acquittal that entitles the defendant to the plea of double jeopardy at a retrial.

No. 2,255—August 26, 1974

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, *Respondent*, *v.* FOWLER ET AL, *Appellants*.

Appeal from Circuit Court, Multnomah County.

JAMES R. ELLIS, Judge.

Argued and submitted July 16, 1974.

James Scudder, Portland, argued the cause and filed the brief for appellants.

John W. Burgess, Assistant Attorney General, Salem, argued the cause for respondent. With him on the brief were Lee Johnson, Attorney General, and W. Michael Gillette, Solicitor General, Salem.

Before SCHWAB, Chief Judge, and THORNTON and TANZER, Judges.

AFFIRMED.

TANZER, J.

Three individuals and two corporations were convicted upon a consolidated trial of six indictments of violations of the Oregon Subdivision Control Law,© and sentenced as misdemeanants to pay fines and abide by special conditions. They appeal. Former ORS 92.230 (1), the prohibitory section of that law, provides:

"No person shall offer any subdivided lands for sale or lease • • • without having complied with

© The Subdivision Control Law has since been repealed, Or Laws 1973, ch 421, and reinstated in substantially similar form, Or Laws 1974 Spec. Sess., ch 1.

all the applicable provisions of ORS 92.210 to 92.390."

The indictments are all in similar form. A typical one charges the basic violation and then specifies the alleged failures of statutory compliance:

"The said defendants, on or about April 14, 1971, in the County of Multnomah, State of Oregon, did unlawfully and knowingly, as subdivider or agent thereof, offer subdivided lands for sale to one John T. Baxter and Mary E. Baxter, husband and wife, located in the west half of Section 28, Township 1 north, Range 5 east of the Willamette Meridian without having complied with the Oregon [S]ubdivision Control Law as required in Oregon Revised Statute 92.230 (1) in that the said defendants did:

"(1) Fail to file notice of intent to subdivide [ORS 92.240], and

"(2) Fail to obtain public report [ORS 92.290], and

"(3) Fail to comply with conditions precedent to sales of parcels [ORS 92.310], and

"(4) Fail to disclose that said property was not lawfully approved for sale and that in order to develop said property sanitation permits were required and that such permits were not obtainable [ORS 92.230], and

"(5) Fail to submit preliminary plans to the State or local Health Officer for proposed domestic water supply and sewage disposal facilities for said property [ORS 92.340], and

"(6) Use a misleading advertisement to promote sale of subdivided land, in that said defendant

did display a 'For Sale' sign upon said property when said property could not be lawfully sold and did display a plat map of said subdivision to designate lots to be sold [ORS 92.350].

contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon."

The parallel indictments flow from the sales of six lots comprising a subdivided parcel of land in eastern Multnomah County. Defendant Smith purchased the parcel and sold the six lots. Title generally flowed through Smith's corporate entity, defendant Scenic Sites, Inc. Defendant Fowler is a real estate agent who handled the sale of the parcel to Smith and the sales of the lots by Smith. Defendant Hollingsworth, a real estate agent employed by Fowler, showed two of the lots to their buyers and, under Fowler's supervision, prepared the papers and received commission on one sale. Defendant Country Realty Company is the corporate entity through which Fowler and his wife conduct their business. Other defendants were acquitted upon motion.

Defendants assign as error the denial of their motions for directed verdict, which may be regarded as motions for judgment of acquittal, ORS 136.445, asserting several contentions.

1. Defendants Fowler, Hollingsworth and Country Realty Company first contend that they cannot be liable for violation of ORS 92.320 because only the owner can "offer" his lands for sale and the real estate agent can neither offer nor bind his principal to an offer,

but can only solicit offers to purchase and submit them to his principal.

A broad definition of "offer" might well be warranted by the broad policy of consumer protection which underlies the Subdivision Control Act,[®] and the common intricate involvement of real estate agents in the offering of subdivided lands to the public. However, no such statutory interpretation is required for the disposition of this case. The trial court ruled correctly that there was evidence to prove that the defendants were liable as aiders and abettors who, by finding buyers and handling the sales transactions, enabled Smith to "offer" his "subdivided lands for sale" and they are thus liable as principles. ORS 161.155 (2) (b).

Defendant Hollingsworth particularly contends that her motion for judgment of acquittal should have been granted because her involvement was less than defendant Fowler's, but her activities were sufficient to go to the jury on a theory of aiding and abetting. Her lesser involvement was properly reflected in her lesser sentence rather than by dismissal despite evidence sufficient to go to the jury.

2. Defendants claim that the state failed to negate the applicability of the statutory exemption of

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® ORS 92.220 (1) provides:

"The Legislative Assembly finds that vast tracts of marginal or submarginal lands in this and other states have been and are now being subdivided and offered to the public as investments and potential residential and commercial property, that the development of new subdivisions and the promotion of sales and leases of such property are now largely uncontrolled and unregulated in this state and that a need exists to protect the public from fraud, deceit and misrepresentation."

certain lands from the Subdivision Control Law.[6] Although it is generally the defendant's burden to prove the applicability of an exception, *State v. Hawkins*, 255 Or 39, 45, 463 P2d 858 (1970); *State v. Alexander*, 6 Or App 526, 531-533, 487 P2d 1151, *rev den* (1971), we need not so decide in this case. Defendants did not assert this contention as a ground for their motion for judgment of acquittal. The case was tried with defendants' acquiescence upon the theory that defendants were obligated to prove the exception. Defendants attempted unsuccessfully to do so during their case-in-chief. Not until the submission of requested instruc-

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[6] ORS 92.230 (2) provides:

"(2) ORS 92.210 to 92.390 do not apply to the sale or leasing of:

"* * * * *

"(e) Subdivided lands in Oregon containing less than 20 separate lots or parcels, which * * * have met the following conditions:

"(A) Each lot is situated on a dedicated road or street constructed to the specifications of the county commissioners of the county or the governing body of the municipality which has accepted such road or street for maintenance; and

"(B) The subdivision has drainage structure and fill necessary to prevent flooding, which structures and fill have been approved by the county commissioners of the county or the governing body of the municipality; and

"(C) Electric power is available at or near each lot; and

"(D) Domestic water supply and sanitary sewage disposal are available at or near each lot, meeting the requirements of the State Board of Health, the Environmental Quality Commission and, in the case of septic tanks, the local health department of the county in which the land is situated."

The state conceded that sub-subsections (B) and (C) were complied with, but defendants' evidence made it clear that (A) and (D) were not. The above quotation appears as the statute existed at the time of the events herein. Since then the reference to the State Board of Health has been deleted. Or Laws 1974 Spec. Sess., ch. 1.

tions did defendants contend that the state was required to prove the non-applicability of the exception. That was too late a stage of the trial at which to attempt to change the law of the case. Their renewal of the contention upon motion for new trial and arrest of judgment does not establish it for appellate review. *State v. Truxall*, 2 Or App 214, 216-217, 467 P2d 643 (1970).

3. Defendants next assert that each of the specifications of the indictment had to be proved since they were connected with the conjunctive "and." Specifications are added to an indictment in anticipation of proof to assist the preparation of the defense. Proof at trial, however, may not conform in all respects to the anticipation. Therefore, although specifications may be alleged in the conjunctive, that does not obligate the state at its peril to prove each one. The proof of any one is sufficient to make out the crime. *State v. Montieth*, 247 Or 43, 48, 417 P2d 1012, *dismissed* 386 US 780 (1967). Here there was proof regarding each allegation and the case was properly submitted to the jury on a conjunctive basis.

4. Defendants contend that there was no proof as to which defendant performed which specified act or omission. The statute makes the seller liable for the offer of land without statutory compliance and the real estate agents were liable either directly or as aiders and abettors.

5. Finally, still in support of the motion for judgment of acquittal, defendants argue that ORS 92.230, infra, is ambiguous and, we infer, therefore void for

vagueness, but it clearly is not. The case was properly submitted to the jury.

Defendants also assign as error the refusal of the trial court to give certain requested instructions. Some of those requested instructions were incorrect for reasons stated above. Others were either irrelevant or called for comment on the evidence. The trial court properly instructed the jury under the statutes. Other assignments of error deal with claims of technical errors which in no way affect the substantive or procedural rights of the parties. We see no public advantage in discussing these remaining assignments.

Affirmed.

Appendix B - Order of Supreme Court of Oregon of November 13, 1974 denying petitioners' petition for review of opinion of Court of Appeals of State of Oregon

November 13, 1974

Mr. James Scudder
Attorney at Law
2044 E. Burnside
Portland, Oregon 97214

Re: State v. Fowler, et al.

Dear Mr. Scudder:

The Supreme Court has today denied appellants' petition for review in the above matter.

Very truly yours,

J. David Gernant
Legal Counsel

JDG:mr
cc: Mr. John W. Burgess
Assistant Attorney General

Appendix C - Excerpts from Petition to Review to Supreme Court of Oregon.

Page 1, Statement of Points

* * *

2. The court erred in holding that double jeopardy did not apply in this case.

Page 4.

Argument

2. The court did not and cannot answer the defense of double jeopardy under both the U.S. d the Oregon constitutions.

Amendment V of the U.S. constitution states in part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *"

Appendix D - First Indictment

(Titled in the Circuit Court of the State of Oregon for the County of Multnomah)

State of Oregon,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Indictment for
	)	violation of
(Petitioners herein)	)	ORS 92.230(1)
	)	
Defendants.	)	

The above-named defendants are accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of Violation of Oregon Subdivision Control Law (Four Counts) committed as follows:

COUNT I

The said defendants, on or about May 10, 1971, in the County of Multnomah, State of Oregon, did unlawfully and knowingly offer subdivided lands for sale to one Clarence J. Kemp and Jean M. Kemp, husband and wife, located in the west half of Section 28, Township 1 north, Range 5 east of the Willamette Meridian without having complied with the Oregon Subdivision Control Law as required in Oregon Revised Statute 92.230(1) in that the said defendants did:

(1) Fail to file notice of intent to subdivide. (ORS 92.240).

(2) Fail to obtain public report. (ORS 92.290).

(3) Fail to comply with conditions precedent to sales of parcels. (ORS 92.310).

(4) Fail to disclose that said property was not lawfully approved for sale and that

in order to develop said property sanitation permits were required and that such permits were not obtainable. (ORS 92.330)(2)

(5) Fail to submit preliminary plans to State Health Officer for proposed domestic water supply and sewage disposal facilities. (ORS 92.340)

(6) Use a misleading advertisement to promote sale of subdivided land, in that said defendants did display a "For Sale" sign upon said property when said property could not be lawfully sold and did display a plat map of said subdivision to designate lots to be sold.

contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

COUNT II

As part of the same act and transaction alleged in Count I herein, the defendants are accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of VIOLATION OF OREGON SUBDIVISION CONTROL LAW committed as follows:

The said defendants, on or about April 27, 1971, in the County of Multnomah, State of Oregon, did unlawfully and knowingly offer subdivided lands for sale to one Kenneth E. Frizzell and Earleen C. Frizzell, husband and wife, located in the west half of Section 28, Township 1 north, Range 5 east of the Willamette Meridian without having complied with the Oregon Subdivision Control Law as required in Oregon Revised Statute 92.230(1) in that the said defendants did:

(1) Fail to file notice of intent to subdivide. (ORS 92.240).

(2) Fail to obtain public report. (ORS 92.290).

(3) Fail to comply with conditions precedent to sales of parcels. (ORS 92.310).

(4) Fail to disclose that said property was not lawfully approved for sale and that in order to develop said property sanitation permits were required and that such permits were not obtainable. (ORS 92.330)(2).

(5) Fail to submit preliminary plans to State Health Officer for proposed domestic water supply and sewage disposal facilities. (ORS 92.340).

(6) Use a misleading advertisement to promote sale of subdivided land, in that said defendants did display a "For Sale" sign upon said property when said property could not be lawfully sold and did display a plat map of said subdivision to designate lots to be sold.

contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

COUNT III

As part of the same act and transaction alleged in Counts I and II herein, the defendants are accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of
VIOLATION OF OREGON SUBDIVISION CONTROL LAW committed as follows:

The said defendants, on or about April 20, 1971, in the County of Multnomah, State of Oregon, did unlawfully and knowingly offer subdivided lands for sale to Scenic Sites, Inc., an Oregon corporation, located in the west half of Section 28, Township 1 north, Range 5 east of the Willamette Meridian without having complied with the Oregon Subdivision Control Law as required in Oregon Revised Statute 92.230(1) in that the said defendants did:

(1) Fail to file notice of intent to subdivide. (ORS 92.240).

(2) Fail to obtain public report. (ORS 92.290).

(3) Fail to comply with conditions precedent to sales of parcels. (ORS 92.310).

(4) Fail to disclose that said property was not lawfully approved for sale and that in order to develop said property sanitation permits were required and that such permits were not obtainable. (ORS 92.330)(2).

(5) Fail to submit preliminary plans to State Health Officer for proposed domestic water supply and sewage disposal facilities. (ORS 92.340).

(6) Use a misleading advertisement to promote sale of subdivided land, in that said defendants did display a "For Sale" sign upon said property when said property could not be lawfully sold and did display a plat map of said subdivision to designate lots to be sold.

contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

COUNT IV

As part of the same act and transaction alleged in Counts I, II and III herein, the defendants are accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of

VIOLATION OF OREGON SUBDIVISION CONTROL LAW

committed as follows:

The said defendants, on or about May 10,1971, in the County of Multnomah, State of Oregon, did unlawfully and knowingly offer subdivided lands for sale to Scenic Sites, Inc., an Oregon corporation, located in the west half

of Section 28, Township 1 north, Range 5 east of the Willamette Meridian without having complied with the Oregon Subdivision Control Law as required in Oregon Revised Statute 92.230(1) in that the said defendants did:

(1) Fail to file notice of intent to subdivide. (ORS 92.240).

(2) Fail to obtain public report. (ORS 92.290).

(3) Fail to comply with conditions precedent to sales of parcels. (ORS 92.310).

(4) Fail to disclose that said property was not lawfully approved for sale and that in order to develop said property sanitation permits were required and that such permits were not obtainable. (ORS 92.330)(2)

(5) Fail to submit preliminary plans to State Health Officer for proposed domestic water supply and sewage disposal facilities. (ORS 92.340).

(6) Use a misleading advertisement to promote sale of subdivided land, in that said defendants did display a "For Sale" sign upon said property when said property could not be lawfully sold and did display a plat map of said subdivision to designate lots to be sold.

contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated May 17, 1973, at the City of Portland, in the County aforesaid.

Appendix E - Excerpts from transcript of trial on first indictments.

Starting at page 56 on line 24 of the transcript:

THE COURT: All right. I am of the opinion that this matter, this question is controlled by (page 57) ORS 132.530, which provided the indictment must be direct and certain as to the parties charged, the crime charged and the particular circumstances of the crime charged when such circumstances are necessary to constitute a complete crime.

It seems to me that to constitute a crime under this statute it is essential the defendants be persons within a particular class, specifically they must be subdividers. That is a situation which must exist and must be pleaded and contained in the indictment. These indictment do not set forth that situation, and I think that the indictments are defective and I am going to sustain the demurrer.

MR. MACKEY: With Your Honor's permission to resubmit the matter to the Grand Jury?

MR. WEST: I would like to make a motion to dismiss each and all of the indictments.

THE COURT: I will allow the District Attorney's motion to resubmit the matter to the Grand Jury, and if you feel that is not appropriate under the case law and the Constitution of the State of Oregon, you can attack the new indictments after they have been returned.

Appendix F - Order entered November 6, 1973 by trial court allowing oral demurrer of prosecutor to plea of double jeopardy:

These matters having been consolidated for trial upon consent of defendants on the 30th day of August, 1973, the State appearing by and through Paul G. Mackey, Deputy District Attorney, defendants, and each of them, present and appearing by and through Willis West, and

Whereupon the jury was duly empaneled, opening statements made by respective counsel and the state called its first witness, counsel for defendants thereafter orally demurred to each of said consolidated indictments on grounds earlier ruled upon and the further additional ground that the said indictments failed to state facts sufficient to allege a crime, and

The court thereupon excused the jury and heard arguments of counsel on the further and additional ground that each indictment was insufficient to state a crime, and the court being fully advised in the premises, it hereby

Finds that the said indictments fail to comply with provisions of ORS 132.530 and thus fail to state facts with sufficient directness and certainty to constitute a crime and the court

Further finds that each and every other ground of defendants' demurrer has been overruled by the Chief Criminal Court with which ruling the court agrees and, therefore, it is hereby

ORDERED that defendants' demurrer be and is hereby allowed and it is

FURTHER ORDERED that the State be granted leave to resubmit to the Grand Jury for Multnomah County the matters contained within the respective indictments for further review and action, and it is

FURTHER ORDERED that the within indicted matters be continued to a further date to be determined by the Chief Criminal Court.

_____

Clifford B. Olsen
Judge

Appendix G - Second indictment

(Circuit Court of State of Oregon for Multnomah County, State of Oregon, plaintiff, vs petitioners)

"The above-named defendants are accused by the Grand Jury of Multnomah County, State of Oregon, by this indictment of the crime of

VIOLATION OF OREGON SUBDIVISION CONTROL LAW committed as follows:

The said defendants, on or about April 20, 1971, in the County of Multnomah, State of Oregon, did unlawfully and knowingly, as subdivider or agent thereof, offer subdivided lands for sale to Scenic Sites, Inc., an Oregon corporation, located in the west half of Section 28, Township 1 north, Range 5 east of the Willamette Meridian without having complied with the Oregon subdivision Control Law as required in Oregon Revised Statute 92.230(1) in that the said defendants did:

(1) Fail to file notice of intent to subdivide, and

(2) Fail to obtain public report, and

(3) Fail to comply with conditions precedent to sales of parcels, and

(4) Fail to disclose that said property was not lawfully approved for sale and that in order to develop said property sanitation permits were required and that such permits were not obtainable, and

(5) Fail to submit preliminary plans to the State or local Health Officer for proposed domestic water supply and sewage disposal facilities for said property, and

(6) Use a misleading advertisement to promote sale of subdivided land, in that said defendant did display a "For Sale" sign upon said property when said property could not be lawfully sold and did display a plat map of said subdivision to designate lots to be sold. contrary to the Statutes in such cases made and provided, and against the peace and dignity of the State of Oregon.

Dated September 18, 1973, at the City of Portland, in the County aforesaid.

_____A TRUE BILL

/s/ Glenn Clevenger
Foreman of the Grand Jury

HARL HAAS, District Attorney

Witnesses

By /s/ Paul Mackey Deputy

Examined Before the Grand Jury:
Charles F. Medak
Jean M. Kemp
Kenneth E. Frizzell
John T. Baxter
Robert S. Baldwin
William Markowski
Harding Chinn
Jack Jones

Appendix H - Plea of Double Jeopardy made before the trial court by counsel for petitioners on October 9, 1973, after the first trial and before the second trial:

"MR. WEST: . . . Come now the defendants above named, at their arraignment on the indictments herein, and each plead that they have been individually acquitted of the same crime charged in said indictment by virtue of a trial conducted in this county on the 30th day of August, 1973 and a judgment entered on September 4th, 1973; and show to this court that these defendants appeared in person before the Circuit Court of Multnomah County, Oregon on the 30th day of August, 1973 with counsel for trial of the same charges set forth in the indictment on file herein, a jury was duly empanneled and sworn, opening statements were made by counsel and thereupon the State proceeded to offer evidence in support of the said charges to which defendants objected and demurred in the presence of the jury; the jury was excused and the court heard the arguments on the objections and demurrer in open court in the presence of the defendants; the trial thereafter continued and concluded in the absence of the jury which said jury was not discharged in the presence of any of said defendants all as shown by the official transcript of proceedings of said trial attached hereto and made a part of this plea.

"This plea is signed individually by each of the named defendants and verified by one of the defendants, Mr. Harry Fowler.

"At this time I ask each of the defendants individually is that your plea at this time?"

"THE DEFENDANTS: Yes."

Appendix I - Order sustaining State's Demurrer to Defendants' Plea of Former Acquittal * * *

On October 22, 1973, this matter came on for hearing on plaintiff's Motion to Strike Plea of Former Acquittal and Alternative Motion to Strike Defendants' Jury Trial Request on Claim of Former Jeopardy, plaintiff appearing by David L. Hattrick, Deputy District Attorney, and defendants appearing by and through their attorney, Willis West, and

The state having moved in open court for leave to alternatively demur orally to defendants' plea of former acquittal on the same grounds and authorities cited in the said Motion to Strike Plea and Alternative Motion to Strike Jury Trial Request, and for leave to file a formal demurrer for the record consistent therewith, and the court being fully advised in the premises,

IT IS ORDERED that plaintiff's motion for leave to demur orally and to file a formal demurrer for the record is hereby allowed, and

The parties having fully argued the merits of said demurrer, and the court being fully advised in the premises, now, therefore,

IT IS FURTHER ORDERED that plaintiff's demurrer to the said plea of former acquittal in each case herein is hereby sustained, and

IT IS FURTHER OFDERED that trial on defendants' alternative plea of not guilty is hereby set to commence November 13, 1973.

/s/ Clifford B. Olsen
DLIFFORD B. OLSEN, Judge

Appendix J - Trial Order entered on December 21, 1973.

TRIAL ORDER

On November 21, 1973, these matters came before the Honorable James R. Ellis for trial of the above defendants on the charge of VIOLATION OF OREGON SUBDIVISION CONTROL LAW in each of the above-captioned cases, said cases having previously been consolidated for purposes of trial, the plaintiff appearing by Paul G. Mackey, Deputy District Attorney, and the defendants appearing in person and with their attorney, Willis A. West.

A jury was duly empaneled and sworn; opening statements were made by respective counsel, and testimony of witnesses for and on behalf of the state was received. At the close of the state's case, defense counsel moved for directed judgments of acquittal as to defendants LEROY SMITH, SYLVIA FOWLER and KENNETH BLIVEN in all the above-captioned cases and defendant SCENIC SITES, INC. in Case Nos. C 73-08-2675 Cr and C 73-09-2812 Cr, and after hearing the arguments of respective counsel, having fully considered said matter and being fully advised in the premises,

IT IS ORDERED that the motion for judgments of acquittal as to defendants LEROY SMITH, SYLVIA FOWLER and KENNETH BLIVEN in all the above-captioned cases and defendant SCENIC SITES, INC. in Case Nos. C 73-08-2675 Cr and C 73-09-2812 Cr, be and the same is hereby allowed, and said judgments of acquittal shall be entered of record in said cases and any bond heretofore posted therein by said defendants exonerated.

After receiving evidence on behalf of the remaining defendants, and hearing the

arguments of counsel, and after due deliberation, the jury returned its verdicts which found defendants GEORGE RAYMOND SMITH, HARRY EDMOND FOWLER, JR., COUNTRY REALTY COMPANY, MARILYN HOLLINGSWORTH, and SCENIC SITES, INC. GUILTY as charged in all cases considered by the jury.

IT IS FURTHER ORDERED that said verdicts be received and entered in the records of this court and causes, and that the jury be discharged from further consideration of these cases.

IT IS FURTHER ORDERED that the within matters be continued for imposition of sentence to November 30, 1973 at 9:00 a.m.

JAMES R. ELLIS, Judge

Appendix K - Judgments of the Circuit Court of the State of Oregon for the County of Multnomah entered on December 21, 1973 and each of which is signed by James R. Ellis, Judge

v. Scenic Sites, Inc.

On November 30, 1973, this matter came before the court, the plaintiff appearing by Paul G. Mackey, Deputy District Attorney, and the above-named defendant appearing by its president, George Raymond Smith, and with its attorney, Willis A. West.

IT IS ADJUDGED that the said defendant has been convicted on its pleas of Not Guilty and verdicts of GUILTY of the offense of VIOLATION OF OREGON SUBDIVISION CONTROL LAW, as charged in each of the within cases, and this being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time, and the court having deemed the conviction in Case No. C 73-09-2820 Cr to be an included offense, said conviction is hereby merged with Case No. C 73-09-2800 Cr for purposes of sentencing.

IT IS FURTHER ADJUDGED that said defendant pay a fine in the amount of $500, payable on or before December 21, 1973.

IT IS ORDERED that any bond heretofore posted herein by said defendant is exonerated.

v. Country Realty Company

On November 30, 1973, this matter came before the court, the plaintiff appearing by Paul G. Mackey, Deputy District Attorney, and the above-named defendant appearing by its president, Harry Edmond Fowler, Jr., and with its attorney, Willis A. West.

IT IS ADJUDGED that the said defendant has been convicted on its pleas of Not Guilty and verdicts of GUILTY of the offense of VIOLATION OF OREGON SUBDIVISION CONTROL LAW, as charged in each of the within cases, and this being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time, and the court having deemed the convictions in Case Nos. C 73-08-2673 Cr, C 73-09-2818 Cr and C 73-09-2811 Cr to be included offenses, said convictions are hereby merged with Case No. C 73-07-2798 Cr for purposes of sentencing.

IT IS FURTHER ADJUDGED that said defendant pay a fine in the amount of $500, payable on or before December 21, 1973.

IT IS ORDERED that any bond heretofore posted herein by said defendant is exonerated.

/s/ James R. Ellis
JAMES R. ELLIS, Judge

v. George Raymond Smith

On November 30, 1973, this matter came before the court, the plaintiff appearing by Paul G. Mackey, Deputy District Attorney, and the above-named defendant appearing in person and with his attorney, Willis A. West.

IT IS ADJUDGED that the said defendant has been convicted on his pleas of Not Guilty and verdicts of GUILTY of the offense of VIOLATION OF OREGON SUBDIVISION CONTROL LAW, as charged in each of the within cases, and this being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time, and the court having deemed the convictions in Case Nos. C 73-08-2669 Cr, C 73-09-2817 Cr and C 73-09-2807 Cr to be included offenses, said convictions are hereby merged with Case No. C 73-09-2793 Cr for purposes of sentencing.

IT IS FURTHER ADJUDGED that imposition of sentence is suspended and defendant placed on probation to the court for a period of Three (3) Years from this date, on the conditions (1) that if the purchaser of the land involved in Case No. C 73-09-2793 Cr tenders title to said land to the defendant within one year from the date of this sentence order, the defendant shall return the full purchase price to the purchaser together with the amount of any taxes or out-of-pocket expenditures incurred by the purchaser related to the purchase price of said land; (2) that he pay a fine in the amount of $500.00, payable on or before December 21, 1973 to the Office of the Court Administrator for the Circuit Court of Multnomah County; (3) that he disclose to appropriate local or state agencies each and every land division or partitionings of any sort in which he is engaged; and (4) that he does not make any further offers for sale of lands within subdivision or partitioning for

which approval or exemption is first required without obtaining such approval or exemption.

IT IS ORDERED that upon payment of said fine any bond heretofore posted herein by said defendant is exonerated.

/s/ James R. Ellis
JAMES R. ELLIS, Judge

v. Marilyn Hollingsworth

On November 30, 1973, this matter came before the court, the State of Oregon appearing by Paul G. Mackey, Deputy District Attorney, and the above-named defendant appearing in person and with her attorney, Willis A. West.

IT IS ADJUDGED that the said defendant has been convicted on her pleas of Not Guilty and verdicts of GUILTY of the offense of VIOLATION OF OREGON SUBDIVISION CONTROL LAW, as charged in the within cases, and this being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time,

IT IS FURTHER ADJUDGED that the offense of VIOLATION OF OREGON SUBDIVISION CONTROL LAW be and it is hereby declared a Misdemeanor, and the court having deemed the conviction in Case No. C 73-08-2671 Cr to be an included offense, said conviction is hereby merged with the other cases herein for purposes of sentencing.

IT IS FURTHER ADJUDGED that the said defendant be and she is hereby discharged.

IT IS ORDERED that any bond heretofore posted herein by said defendant is exonerated.

/s/ James R. Ellis
JAMES R. ELLIS, Judge

v. Harry Edmond Fowler, Jr.

On November 30, 1973, this matter came before the court, the plaintiff appearing by Paul G. Mackey, Deputy District Attorney, and the above-named defendant appearing in person and with his attorney, Willis A. West.

IT IS ADJUDGED that the said defendant has been convicted on his pleas of Not Guilty and verdicts of GUILTY of the offense of VIOLATION OF OREGON SUBDIVISION CONTROL LAW, as charged in each of the within cases, and this being the time for imposition of sentence, and no reason appearing to the court why sentence should not be pronounced at this time, and the court having deemed the convictions in Case Nos. C 73-09-2815 Cr, C 73-09-2809 Cr and C 73-08-2670 Cr to be included offenses, said convictions are hereby merged with Case No. C 73-09-2791 Cr for purposes of sentencing.

IT IS FURTHER ADJUDGED that imposition of sentence is suspended and defendant placed on probation to the court for a period of Three (3) Years from this date, on the conditions (1) that he pay a fine in the amount of $300.00, payable on or before December 21, 1973 to the Office of the Court Administrator for the Circuit Court of Multnomah County; (2) that he disclose to appropriate local or state agencies each and every land division or partitionings of any sort in which he is engaged, and (3) that he make no further offers for sale of land within subdivision or partitioning for which approval or exemption is first required without obtaining such approval or exemption.

IT IS ORDERED that upon payment of said fine any bond heretofore posted herein by said defendant is exonerated.

/s/ James R. Ellis
JAMES R. ELLIS, Judge

Appendix L - Notice of Appeal

filed February 15, 1974.

Defendants above named, George Raymond Smith, Harry Edmond Fowler, Jr., Marilyn Hollingsworth, Country Realty Company and Scenic Sites, Inc., do hereby appeal to the Court of Appeals of the State of Oregon from all the judgments entered in the Circuit Court of the State of Oregon for the County of Multnomah by the Honorable James R. Ellis on or about December 20, 1973 and December 21, 1973 and this appeal is from each and every judgment entered against defendants or any of them in the cases and causes enumerated on page 1 hereof under the titles set forth in the title page or any other title and this appeal is from any and all convictions and/or fines or sentences against defendants or any of them.

Defendants further appeal from the orders of January 17, 1974 in all of said causes denying defendants' motion in arrest of judgment and for a new trial.

Defendants further appeal from the denial of acquittal of defendants on the grounds of double jeopardy or former acquittal by the Honorable Clifford B. Olsen on or about November 13, 1973 and from the order of the Hon. James R. Ellis made orally on or about November 21, 1973 and again on or about November 30, 1973 denying acquittal of defendants on the grounds of former jeopardy.

Defendants do hereby designate for inclusion in the record all of the testimony and all the instructions given and requested and a transcript of all proceedings in the case and all exhibits in addition to the trial court file.

This notice of appeal is directed to the State of Oregon, Harl Haas, District Attorney for Multnomah County and Paul Mackey, deputy district attorney, who were attorneys for plaintiff. The name of the trial attorney for defendants was Willis West and the name of the attorney for defendants on appeal is the undersigned.

/s/ James Scudder

James Scudder
Route 1 Box 1170, Corbett,
Ore. 97019, 375-2111,
Attorney for Defendants

Appendix M - Excerpt from Petitioners' brief filed in the Court of Appeals of Oregon on

ASSIGNMENT OF ERROR NO. 1

The Court erred in sustaining the State's demurrer to defendants' pleas of former acquittal (P.Tr. 42-43):

"MR. WEST: . . .Come now the defendants above named, at their arraignment on the indictments herein, and each plead that they have been individually acquitted of the same crime charged in said indictment by virtue of a trial conducted in this county on the 30th day of August, 1973 and a judgment entered on September 4th, 1973; and show to this court that these defendants appeared in person before the Circuit Court of Multnomah County, Oregon on the 30th day of August, 1973 with counsel for trial of the same charges set forth in the indictment on file herein, a jury was duly empanelled and sworn, opening statements were made by counsel and thereupon the State proceeded to offer evidence in support of the said charges to which defendants objected and demurred in the presence of the jury; the jury was excused and the court heard the arguments on the objections and demurrer in open court in the presence of the defendants; the trial thereafter continued and concluded in the absence of the jury which said jury was not discharged in the presence of any of said defendants all as shown by the official transcript of proceedings of said trial attached hereto and made a part of this plea.

"This plea is signed individually by each of the named defendants and verified by one of the defendants, Mr. Harry Fowler.

"At this time I ask each of the defendants individually is that your plea at this time?"

"THE DEFENDANTS: Yes."

P.Tr. 78: "THE COURT: I am going to sustain the demurrer to your plea."

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Callender v. Florida, 380 US 519 (1965), 383 U.S. 270 (1966)	3
Carroll v. State, 50 Tex Crim 485, 98 SW 859 (1906)	4
Commonwealth v. Stallard, 237 Ky 166, 35 SW2d 21 (1931)	4
Snyder v. Massachusetts, 291 US 97, 106-107 (1933)	4
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ORS 135.890	3

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-998

HARRY EDMOND FOWLER, JR.,
COUNTRY REALTY COMPANY,
MARILYN HOLLINGSWORTH,
SCENIC SITES, INCORPORATED,
and GEORGE RAYMOND SMITH,

Petitioners,

vs.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of the
State of Oregon

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

Petitioners' statement is accepted.

JURISDICTION

Petitioners' statement is accepted.

QUESTIONS PRESENTED

Respondent does not accept the factual premises upon which petitioners' questions are based, and would state the fundamental questions as follows:

1. Where, after the jury is empaneled, the judge sustains the defendants' demurrers to the indictments and allows the state to retry the defendants, does the doctrine of double jeopardy bar retrial?

2. Where the reason for the discharge of the jury is the sustaining of the defendants' demurrers to the indictments, does the fact that the discharge occurred out of the presence of the defendants raise any constitutional issue?

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners' statement is accepted.

STATEMENT OF THE CASE

Petitioners' statement is accepted.

REASONS FOR DENYING THE WRIT

Petitioners pray for the issuance of a writ directed to the Supreme Court of the State of Oregon. However, as the petition itself indicates, that court merely denied a petition for discretionary review of petitioners' case (Appendix B to Petition). The highest state court which has ruled on the merits of the case is the Court of Appeals of the State of Oregon (see Appendix A to Petition), and it is therefore the judgment of that court which petitioners should have sought to have reviewed.

The further reasons for denying the writ advanced in this brief are submitted in case the Court chooses to overlook this error and to treat the petition as a petition for writ of certiorari to the proper court, as it has done on occasion. See, *e.g.*, *Callender v. Florida*, 380 U.S. 519 (1965), 383 U.S. 270 (1966).

The petition raises no substantial federal question.

Even if jeopardy would otherwise have attached at the first trial, after the jury was empaneled and the state called its first witness, the action of the trial judge at that time in sustaining the petitioners' demurrers to the indictments and in allowing the state to resubmit the case to the grand jury "annulled" jeopardy under ORS 135.890.[①] See *State v. Jones*, 240 Or 546, 548, 402 P2d 738 (1965). The Oregon Supreme Court has said that where an indictment is dismissed upon demurrer under ORS 135.890,

> ". . . the proceeding stand upon the same footing as if the defendant had never been in jeopardy. *City of Portland v. Stevens*, 180 Or 514, 178 P2d 175 (1947)" *State v. Jones*, *supra* at 548; accord *State v. Nichols*, 236 Or 521, 527-528, 388 P2d 739 (1964).

Moreover, it is well-recognized that a subsequent prosecution is not barred where a defendant obtains the dismissal of an indictment during trial and the discharge

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① "135.890 Proceedings not constituting former acquittal. If the defendant was formerly acquitted on the ground of a variance between the indictment and the proof, or if the indictment was dismissed upon a demurrer to its form or substances or discharged for want of prosecution, without a judgment of acquittal or in bar of another prosecution, it is not an acquittal of the same crime."

ORS 135.890 has since been repealed and reenacted, in substance, as ORS 131.535.

of the jury, or where he procures a reversal or mistrial. See, *United States v. Tateo*, 377 US 463 (1964); *Vaccaro v. United States*, 360 F2d 606 (5th Cir. 1966); *Commonwealth v. Stallard*, 237 Ky 166, 35 SW2d 21 (1931) *Carroll v. State*, 50 Tex Crim 485, 98 SW 859 (1906).

In the present case, the fact that the trial judge, after having sustained the demurrers, discharged the jury outside the petitioners' presence is immaterial. The reason for the general rule that the jury should be discharged in the presence of the defendant is to give the defendant an opportunity to object to the discharge. *State v. Chandler, et al*, 128 Or 204, 208-209, 274 P 303 (1929). The reason for the general rule is therefore inapplicable where the defendant procures the dismissal of the indictment and the discharge of the jury.

This Court's discussion of a defendant's privilege to be present at trial is appropriate here:

> ". . . Nowhere in the decisions of this court is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow. . . ." *Snyder v. Massachusetts*, 291 US 97, 106-107 (1933).

CONCLUSION

For the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

LEE JOHNSON
Attorney General of Oregon

W. MICHAEL GILLETTE
Solicitor General

THOMAS H. DENNEY
Assistant Attorney General

JOHN W. BURGESS
Assistant Attorney General
Counsel for Respondent

April, 1975